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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

DATE: MAR 1 3 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Mari Johnson

S Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability and a member of the professions holding an advanced degree. At the time he filed the petition on his own behalf, the petitioner was a fund development officer for The Smallest Seed (TSS), a non-profit organization based in New York, New York. He has since begun working as a manager for program development and family wellness for County Corrections Gospel Mission (CCGM), Coatesville, Pennsylvania. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and several supporting exhibits.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner did not set forth a complete claim of exceptional ability under the standards set forth in the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(k)(3)(ii). The director concluded, however, that the petitioner qualifies as a member of the professions holding an advanced degree. An additional finding of exceptional ability would serve no practical purpose. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on May 10, 2010. In an accompanying cover letter, counsel stated that the petitioner qualifies for the national interest waiver due to "[h]is expertise in AIDS Intervention especially in labor Intensive Industries such as mining, agriculture and energy." On Form ETA-750B, Statement of Qualifications of Alien, the petitioner described his employment history:

[redacted]

The petitioner submitted copies of materials from TSS's 2008 nonimmigrant petition, which led to his classification as an O-1 nonimmigrant individual with extraordinary ability or achievement. In an accompanying letter, dated May 7, 2008, [redacted] director of TSS, stated that the petitioner "is a person of extraordinary ability in the field of community development specifically in the area of HIV/AIDS Education, Training and Counseling." In a separate letter, dated May 20, 2008, Ms. Shannon stated that the petitioner "is passionate in his desire to help . . . all populations suffering from HIV/AIDS, including Americans" (emphasis in original). Also in the May 20, 2008 letter, [redacted] offered the following description of TSS's mission:

> The Smallest Seed, Inc. has undertaken as its Mission *"To provide economic and trade opportunities for the most persecuted, oppressed populations – particularly women and children – enabling them to provide for themselves, their families and to break the cycle of poverty and oppression."*. . .
>
> The philosophy of TSS is not to give away material goods to the needy but to provide skills training and development, offer small loans and Small Business development, and, assist clients to market locally-sourced products to provide producers a favorable wage for their efforts.

(Emphasis in original.) If TSS performed work directly related to HIV/AIDS patient care or prevention, its director made no mention of such work in her letter.

The petition included two new witness letters. Representative [redacted] of Pennsylvania's 16th Congressional District stated:

> It is my understanding that the applicant brings with him a wide range of experience and special skills that could be applied to the advantage of the United States and its citizens. . . .
>
> [The petitioner] implemented programs in the labor-intensive agricultural, energy-supply and mining sectors that focused on the prevention of HIV/AIDS in South Africa. . . . Research results . . . showed that the programs implemented by [the petitioner] not only led to a statistically significant change in sexual behavior, but also to reduced absenteeism and consequently higher productivity in the workplace.

[redacted] United States Ambassador to Greece, stated:

> I visited [the petitioner] at a special facility for women and children in South Africa in 2004. . . . I was amazed at the success of his and the organizations efforts in changing the lives of AIDS infected and orphaned children and young women.
>
> From his years of experience, I am confident that he could bring his unique skills to bear in supporting the health and well-being of Americans suffering from similar conditions.

None of the witnesses explained how the petitioner's past work in South Africa would be relevant to his work for TSS, an organization that exists "[t]o provide economic and trade opportunities." The petitioner's own job description on Form ETA-750B did not mention any HIV/AIDS-related work for TSS.

On August 12, 2010, the director issued a notice of intent to deny the petition, informing the petitioner that the initial submission did not meet the requirements set forth in *NYSDOT*. In response, counsel stated that, although the petitioner was working as a fund development officer for TSS when he filed the petition, "all the evidence submitted is for a highly skilled HIV/AIDS Prevention and Care Specialist. . . . He wish[es] to use those skills and experience in the USA, and not as a Fund Development Officer." Counsel did not explain why the petitioner accepted employment as a fund development officer if he does not intend to work as a fund development officer, and if there is an urgent need for his efforts in the HIV/AIDS crisis.

Counsel also asserted: "In the HIV/AIDS field, there is an impending crisis with a desperate shortage of qualified health professionals specially with experience in working with blacks." Counsel did not explain in what sense the petitioner, who claims no medical training and whose only academic degree is a B.S. in social work, is a "qualified health professional." Counsel acknowledged that this shortage does not, by itself, qualify the petitioner for a waiver, but counsel observed that the petitioner "is already physically present in the country at a critical time." Counsel did not explain why this made a significant difference, given that the petitioner was "already physically present" in a wholly different capacity, working for an economic aid organization.

Counsel also asserted that the petitioner might not be able to obtain labor certification because "the qualifications required for the job requires a combination of skills and experience in dealing with a particular ethnic group, particularly blacks." Counsel also claimed that, even if the petitioner could obtain a labor certification, the labor certification process would delay the petitioner's ability to begin contributing toward a solution to the problem. Counsel, thus, speculated about the possible outcome of an application for labor certification, but did not claim that any employer had filed such an application or contemplated doing so. Counsel referred to a narrow set of job qualifications, but the petitioner did not document any job offer matching those qualifications. These claims, therefore, rested on speculation.

The petitioner submitted letters from several witnesses, all of whom had varying degrees of contact with the petitioner during his earlier work in Africa. Three of the letters date from 2007-2008, when TSS filed its O-1 nonimmigrant petition. One of those letters is from [redacted] a certified public accountant and principal of [redacted]. [redacted] is also a founding board member of [redacted] which has provided funding and other assistance to [redacted] stated that the petitioner "designed and deployed" a home based care program for [redacted] consisting of three elements:

- Training of care givers in Zulu villages to provide home care to dying AIDS patients;
- Training of shop foremen in large corporations to train employees about prevention of HIV transmission both through medically focused information as well as values of purity within the home; and
- Communicating with judicial and legislative bodies within the government of South Africa on the need for and techniques of AIDS prevention and treatment.

[redacted] added that the petitioner "also had a lead role in facilitating financial and resource planning across all DFL programs, as well as managing communications with DFL donors." [redacted] also stated that, through his experience "developing critical programs to meet the needs in an international setting focused on AIDS and related social issues, [the petitioner] is uniquely qualified to be successful in this challenging new role for The Smallest Seed." No witness from TSS indicated that the petitioner's work there involved "AIDS and related social issues," and counsel essentially conceded that there was no connection.

Yale School of Medicine Professor [redacted] a visiting professor at the Nelson R. Mandela School of Medicine at the University of KwaZulu Natal, stated:

> The "footprints" of [the petitioner] are clearly noticeable in this "best-practice" model of HIV/AIDS intervention. He was instrumental in getting the community in this area to take joint responsibility for their wellness with government and non-governmental groups and international agencies.
>
> He introduced [redacted] to the concept of community-based care at a time when this was not a model used in South Africa, designed the training curriculum,

> wrote the training manual, designed the creative tools necessary in training and in health education and spent countless hours with in-field training. This project soon drew the attention of provincial and national officials and placed [the petitioner], [redacted] and Philanjalo Care Centre in the public eye and on to the international health stage. . . . The ground work they initiated provided the infrastructure for much of the work that my colleagues and I have been able to accomplish, presently most notably in the area of combating the epidemics of multiple drug resistant (MDR) and XDR TB in HIV co-infected patients.

[redacted] described the petitioner as "the leader of the Doctors for Life workplace programme."

[redacted], stated that the petitioner "was mainly responsible for the coordination of [redacted] activities," including management of [redacted] Program" and "the [redacted] project for terminal AIDS patients."

The remaining letters are newly prepared to support the immigrant petition and national interest waiver application. [redacted] of the Church of Scotland Hospital and Philanjalo Care Centre in South Africa stated:

> [W]e looked for a community-based system of terminal care that could work in partnership with the institutionalised health service.
>
> I was impressed with the pragmatic solution proposed by [the petitioner]. . . . [The petitioner] suggested the training of unpaid, community volunteers who would act as educators and supporters of families who were taking care of dying relatives in their homes. . . .
>
> [H]e developed [redacted]8. . . . [The petitioner] and I then wrote the training manual for [redacted] . . . [which] proved to be very popular amongst trainers from other organisations, including the Nursing Department of the University of South Africa. . . .
>
> The Home Based Care Project at my hospital has benefited from [the petitioner's] involvement and has since received several accolades as a best practice model.

[redacted]), now a scientific review officer at the National Institutes of Health (NIH), called the petitioner "a pioneer in the care of rural, semi-literate terminal AIDS patients, and involved in the proactive prevention of HIV infection."

[redacted] of Walter Sisulu University, South Africa, stated:

> I was requested to do an Evaluation of the "Living Safely["] HIV-prevention program implemented at the [redacted] mines . . . developed under the [petitioner's] leadership. . . .
>
> [The petitioner] developed a program that utilized the dynamic influence of peer-based education to bring about meaningful changes in lifestyle to reduce sexually infected diseases, including HIV and other debilitating diseases that impacted the gold mine's productivity and profitability.
>
> The results were extremely positive and we recorded statistically significant changes in behaviour that ultimately reduced absenteeism due to clinic attendance. . . .
>
> The principles and benefits of peer-based education that [the petitioner] developed are now widely recognized and implemented.

A copy of a published study by [redacted] indicated that a "primary evaluation" of the plan described above "showed encouraging and important results. Hopefully follow-up studies will confirm these findings and also demonstrate a decrease in AIDS at the mine."

[redacted] "worked very closely with [the petitioner] at Doctors For Life International, South Africa from 2004 to 2006." [redacted] stated that the petitioner "developed a very innovative system empowering local communities to care for members affected by HIV/AIDS at a significantly reduced cost," and "also developed training and audio-visual materials that are utilized by organizations in several African countries."

[redacted], Pennsylvania, worked with the petitioner in Kwazulu Natal, South Africa, in 2002-2003 when both of them worked for Doctors for Life International (DFL). [redacted] stated that "[h]ealth care professionals in this country are not prepared for" demographic shifts in populations affected by HIV/AIDS, and that the petitioner "has the knowledge and personal skills to contribute greatly to the development of national and local programs to prevent an HIV/AIDS epidemic in the U.S."

The director denied the petition on November 9, 2010, finding that the petitioner's occupation has substantial intrinsic merit, but that the petitioner had not shown its national scope or that the petitioner's accomplishments in that occupation distinguish him from others in the field. The director noted that, while numerous witnesses asserted that the petitioner had prepared training manuals and other materials, "[t]he petitioner did not submit any evidence of these products, training manuals, articles, or innovative approaches, nor did the petitioner explain how these have been widely implemented in his field."

On appeal, counsel cites various statistics to show that HIV/AIDS care and prevention is inherently national in scope. The AAO finds this information persuasive.

With respect to the petitioner's impact and influence, counsel asserts:

> The Petitioner was [redacted]
>
> . . . The benefit of hindsight now shows that the Petitioner was very effective in this role. . . . This suggests that he has expert knowledge and skills to develop policy on a national level, a skill that he will apply in the USA. . . .
>
> The Petitioner is Founding member of [redacted] that met for the first time on January 27, 1994 in Braamfontein. . . .
>
> Both [of the above assertions] serve[] as evidence that the Petitioner has become one of a very small group who operate at the highest level of his field and have impacted the field beyond anyone else with the same minimum qualifications. . . .
>
> The Petitioner developed and personally managed an effective Peer-based prevention program to prevent HIV-infection amongst workers in a variety of economic sectors, including mining, agriculture and energy-supply.

The petitioner submits copies of training materials, reports, and other related materials showing that the petitioner has worked to fight the spread of HIV/AIDS in South Africa.

While the appeal was pending, CCGM filed a nonimmigrant petition on the petitioner's behalf. That employer's web site included the following description of the petitioner's role there:

> His responsibilities include promoting and developing the corporate identity of the organization whilst at the same time applying his knowledge, skills and experience to help those impacted by crime and incarceration in Chester County. This includes programs in prison, helping incarcerated fathers to prepare for successful reentry into their families and society as well as working outside of prison to help dependents deal with family reconstruction, incarceration and reentry.

Source: http://countycorrectionsgospelmission.org/about/staff/ (printout added to record December 28, 2011). In a notice to the petitioner dated January 13, 2012, the AAO stated:

> Every prior submission in support of your petition included a heavy and narrow emphasis on your work and qualifications as "a highly skilled HIV/AIDS Prevention and Care Specialist." Your latest position at County Corrections Gospel Mission, however, does not appear to relate to HIV/AIDS prevention and care at all. This very significant shift in emphasis necessarily has obvious consequences for your claim that you will serve the national interest by addressing the HIV/AIDS crisis in the United States.

In response, the petitioner submits a letter dated January 10, 2011, signed by [redacted] board of directors. Another copy of this letter accompanied CCGM's Form I-129 nonimmigrant petition in January 2011. The petitioner also submits an accompanying job description, which reads, in part:

> The Manager: [redacted] *generally* responsible for the project management of our existing programs and support unit but [the petitioner] will *specifically* be responsible for developing new community-based initiatives that will address the prevention of HIV/AIDS and Sexually Transmitted Infections in accordance with the newly released US National AIDS Plan.

Counsel stated: "In our opinion, the information on the website should not be regarded as primary [evidence] of 'documented employment.'" Counsel asserted that the quoted web page is not, and is not intended to be, a complete description of the petitioner's job duties.

Counsel asserts that, by referring to the job description in CCGM's web site as "documented employment," the AAO made "a deduction . . . based on a source of information not intended for that purpose." The petitioner submits nothing from CCGM to explain the "intended . . . purpose" of the quoted passage from the web site, if not to describe the petitioner's employment there. Counsel also observes that the web page did not purport to present a complete list of the petitioner's responsibilities. Instead, the site indicated that the petitioner's "responsibilities include" various representative examples and broad functions. Counsel contends that the word "include" implied that the petitioner had additional duties beyond those listed. Even if this is true, it does not stand to reason that CCGM would omit the petitioner's primary or most important duties from a capsule description of the petitioner's role at CCGM.

The petitioner submits a copy of a CCGM pamphlet entitled *Bringing Hope*. The publication, the "intended purpose" of which is self-evidently to inform the public about the scope and nature of CCGM's activities, lists CCGM's "vision," "mission" and "objectives," and describes numerous "ministries," "opportunities" and other activities. The pamphlet describes "day camps," a "Mom's Club" and a "Skateboard Ministry," but does not contain any mention at all of HIV or AIDS. Throughout its text, *Bringing Hope* makes it clear that CCGM exists not as a public health organization for the general benefit of the community at large, but as a religious missionary organization "established to address the national spiritual crisis that is now reflected in and through America's Criminal Justice systems." The record contains no credible evidence that CCGM has, or seeks, a position of influence in terms of national HIV/AIDS policy.

With respect to counsel's remarks about the web site's "intended . . . purpose," the AAO observes that CCGM has offered one job description for the "intended purpose" of informing the public about the duties of its staff, and a very different job description for the "intended purpose" of securing immigration benefits for the petitioner. Similarly, the "intended purpose" of the *Bringing Hope* pamphlet is obviously to inform the public about CCGM's activities, but CCGM did not mention HIV/AIDS-related community outreach in that publication.

[redacted] letter indicates that CCGM had not yet started its HIV/AIDS work before it hired the petitioner, because no one else at CCGM was qualified to run such a program. The assertion that CCGM intends, one day, to operate such a program is inherently speculative and lacks evidentiary support in the record.

Counsel contends that CCGM's web site, describing the petitioner's duties and responsibilities, is not "documented evidence" of the petitioner's actual duties and responsibilities. Instead, counsel contends that [redacted] letter is "'documented evidence' about his present role, functions and duties." Counsel does not explain how a letter that exists only for the purpose of obtaining benefits for the petitioner amounts to "documented evidence" while CCGM's public statements do not. Counsel lists several initiatives that the petitioner has supposedly undertaken in the year since [redacted] signed letters on the petitioner's behalf, including "launching the two websites of County Corrections Gospel Mission," but the record contains nothing to corroborate these claims (such as, for instance, printouts from "the two [unidentified] websites").

The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). If, as counsel claims on appeal, the petitioner's primary duty concerns development of "community-based initiatives" to combat HIV transmission, then it would be reasonable to expect some mention of those initiatives in a public web site.

When judging the credibility of the petitioner's submissions, it is highly significant that HIV/AIDS prevention and education only surface as major elements of the petitioner's current job in the context of immigration filings. The AAO also cannot ignore that TSS's nonimmigrant petition on the alien's behalf strongly emphasized his past work with HIV/AIDS. When called upon to explain how his largely administrative/managerial work at TSS related to HIV/AIDS, the petitioner submitted no evidence to that effect. Instead, counsel essentially acknowledged that there was no strong connection, stating that the waiver application rested on the petitioner's HIV/AIDS work, not on his later fund development work for TSS. Thus, the record shows that the petitioner has, in the past, relied upon his past HIV/AIDS-related work to obtain immigration benefits that allowed him to perform unrelated work. In this light, the differences between CCGM's public materials and its letters to USCIS are very significant.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 582, 591-92.

Counsel asserts that denial of the waiver application "will send a confusing message in the light of the President's call" to fight HIV and AIDS. The intrinsic merit of efforts against HIV/AIDS has never been in dispute in this proceeding. Nevertheless, a stated intention to combat HIV/AIDS is not, and has never been, sufficient by itself to qualify an alien for the national interest waiver.

CCGM has heretofore restricted itself to local missionary activities with prison inmates and their families. The assertion that CCGM now intends to extend its reach into national HIV/AIDS policy lacks credible evidentiary support. Counsel claims that the petitioner "has expert knowledge and skills to develop policy on a national level," but the record does not show that any policy-making body in the United States has solicited the petitioner's involvement or is aware of his purportedly influential work.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.